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FITRACO NV

v.

MST AD SURIA SDN BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
K ANANTHAM JC
[SUIT NO: D-24-NCC-16-2009]
8 FEBRUARY 2010

C ***LAND LAW:*** *Charge - Fixtures - Overseas loan agreement - Default in repayment - Creation of charge over movable property under laws of Malaysia - Enforcement of charge in Malaysia - Arbitration agreement - Proper law applicable - Landlord's Waiver, validity of - Estoppel*

D ***LANDLORD AND TENANT:*** *Fixtures - Charge - Overseas loan agreement - Default in repayment - Creation of charge over movable property under laws of Malaysia - Enforcement of charge in Malaysia - Arbitration agreement - Proper law applicable - Landlord's Waiver, validity of - Estoppel*

E ***CONTRACT:*** *Loan - Default in repayment - Charge - Fixtures - Overseas loan agreement - Creation of charge over movable property under laws of Malaysia - Enforcement of charge in Malaysia - Arbitration agreement - Proper law applicable - Landlord's Waiver, validity of - Estoppel*

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The plaintiff provided a loan to the first defendant to finance the purchase of certain equipment, the loan being secured by a legal charge over the equipment. The whole transaction took place overseas. The equipment was then located to a site belonging to the
G second defendant and the second defendant executed a Landlord's Waiver ('Waiver') in the plaintiff's favour. When the first defendant defaulted in the repayment of the loan, the plaintiff sought to recover the equipment pursuant to its rights under the Waiver. The second defendant, however, refused to permit the plaintiff or its
H agent from entering the site as it had entered into an agreement to purchase the equipment from the first defendant. The first defendant's default and the discovery of the second defendant's intention to retain possession of the equipment prompted the plaintiff to file the present originating summons.

I

The first defendant raised the following issues of law in order to deny the relief sought by the plaintiff: (a) the concept of a legal charge over movable property does not exist in the laws of Malaysia; (b) the plaintiff could not enforce the charge in Malaysia unless it was in possession of a banking licence or the necessary approvals were obtained before the parties entered into the loan agreement; and (c) the legal charge included an arbitration agreement and the proper law of the charge was English law, the submission being that the plaintiff was precluded from filing this originating summons. The second defendant only raised one issue *ie*, that the validity of the Waiver had expired by the time the plaintiff sought to recover the equipment.

Held (judgment for the plaintiff):

(1) In respect of the first issue: (i) the first defendant was unable to produce any authority in support of its submission that a legal charge over movable property is not possible under the laws of the Malaysia; (ii) movable property is often accepted as valid security under the Bill of Sale Ordinance; and (iii) it is a fact that debentures are prevalent in Malaysia. Debentures, in law, effectively create a legal charge over movable and immovable properties, and invariably a chargee causes a National Land Code charge to be registered over the immovable property forming the subject matter of the charge under the debenture. In the circumstances, there was no merit in the first issue. (para 4)

(2) The second issue has already been resolved in a number of earlier cases. *Banque Nasionale De Paris v. Wuan Swee May & Anor* is authority for the proposition that a foreign entity cannot be said to have carried on banking business within the meaning of the Banking and Financial Institutions Act 1989, if the lending to the Malaysian resident was undertaken outside Malaysia. Accordingly, there was no merit in the second issue. *Banque Nasionale De Paris v. Wuan Swee May & Anor* (foll). (para 4)

(3) The third issue was similarly raised and dealt with in the Federal Court case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat*. As the indebtedness of the first defendant was, on the facts, admitted to the plaintiff, there was clearly nothing

A to arbitrate. Also, the fact that the proper law of the contract was not Malaysian law did not preclude the Malaysian courts from hearing and determining the plaintiff's claim on its merits. The first defendant had not led any evidence to suggest that the English law on the plaintiff's claim was materially different
B from the Malaysian law so as to warrant the calling of expert evidence before this court to determine the merits of the plaintiff's claim. *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat* (foll); *ELF Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd* (refd). (para 4)

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(4) The second defendant's only submission was easily disposed of since it was apparent from an examination of the Waiver that the validity period of the Waiver had no bearing on the plaintiff. Clause 3 of the Waiver expressly provided that the plaintiff was
D entitled to exercise its right of entry into the site and remove the equipment "at any time" after serving notice of default on the first defendant. Since it was not in dispute that the plaintiff had served such notice of default, the second defendant had wrongly refused the plaintiff entry to the site in reliance on the
E validity clause. Presumably, the second defendant's judgment on the matter was clouded by the purchase agreement it had entered into with the first defendant. As the terms of the Waiver acknowledged the existence of the legal charge created by the first defendant in favour of the plaintiff, the second
F defendant was clearly estopped in law from refusing the plaintiff access upon the incidence of default on the first defendant's part. (para 5)

[Order accordingly.]

G **Case(s) referred to:**

Banque Nasionale De Paris v. Wuan Swee May & Anor [2000] 4 CLJ 387 HC ***(foll)***

Tan Kok Cheng & Sons Realty Co. Sdn. Bhd v. Lim Ah Pat [1996] 1 CLJ 231 FC ***(foll)***

H *ELF Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd [1984] 1 LNS 166 HC* ***(refd)***

For the plaintiff - Cheah Soo Chuan (Leonard Yeoh with him); M/s Tay & Partners

For the 1st defendant - Ms Aziriza; M/s Rajah Lau & Assoc

I *For the 2nd defendant - Adilah Ahmad Nordin; M/s Adillah A Nordin*

Reported by Suresh Nathan

JUDGMENT

K Anantham JC:

Brief Facts Relieve

[1] The first defendant purchased a Giant Wheel type R60 and other items defined in a sale agreement dated 8 December 2006 ('the equipment') from Nauta Bussink Asia & Pacific Limited. The plaintiff provided a loan of EURO 3,850,000 to the first defendant to finance the purchase of the equipment. It is not in dispute that the whole transaction including the provision of the loan by the plaintiff to the first defendant was undertaken overseas. The loan provided by the plaintiff was secured by a legal charge over the equipment. This legal charge was duly registered by the first defendant in compliance with the requirements of the Companies Act. In the course of generating income from the use of the equipment, the equipment was located in a site belonging to the second defendant. Having regard to the law relating to fixtures, the plaintiff required the second defendant to execute a Landlord's Waiver in its favour (see exh. J to encl. 4). The terms of the Waiver *inter alia* acknowledged the plaintiff's legal charge over the equipment and entitled it after giving notice of default to the first defendant, to enter into the site to inspect, move or remove the equipment.

[2] The first defendant defaulted in the repayment of the loan, resulting in the plaintiff serving a notice of default on the first defendant. When the plaintiff sought to recover the equipment pursuant to its rights under the Waiver, the second defendant refused to permit the plaintiff or its agent from entering the site (see exh. 1 of encl. 3). The reason for the second defendant's refusal, soon became apparent. The second defendant had entered into an agreement to purchase the equipment from the first defendant (see exh. L of enc. 4). The first defendant's default and the discovery of the second defendant's intention to retain possession of the equipment prompted the plaintiff to file this originating summons (O.S). By an earlier order, the plaintiff was allowed access to the site to enable the plaintiff to upkeep the equipment pending the disposal of this O.S.

On the hearing on the substantive relief sought in encl. 1 by the plaintiff, the first defendant raised the following issues of law as affording the court the basis to deny the relief sought by the plaintiff. The issues raised by the first defendant can be summarised to be as follows:

a) That the concept of a legal charge over movable property does not exist in the laws of Malaysia. According to counsel, a legal charge can only be created over immovable property under the National Land Code;

b) That, notwithstanding, that the loan was provided overseas, the plaintiff cannot enforce the charge in Malaysia unless it is in possession of a banking license or the necessary approvals were obtained before the parties entered into the loan agreement and

c) That the legal charge included an arbitration agreement and the proper law of the charge was English Law. The submission being that the plaintiff is thereby precluded from commencing this O.S.

[3] As regards the second defendant, the only issue raised by counsel is that the validity of the Landlord's Waiver expired by the time the plaintiff sought to recover the equipment. Counsel submitted that the plaintiff was precluded from entering into the premises thereafter to repossess the equipment. This submission taken to its logical conclusion implies that after the expiry, the second defendant became the owner of the equipment under the doctrine of fixtures.

[4] I propose in this short judgment to deal with the legal issues raised by counsel for both defendants. First, counsel for the defendant was unable to produce any authority in support of her submission that a legal charge over movable property is not possible under the Laws of Malaysia. Secondly, movable property is often accepted as valid security under the Bill of Sale Ordinance. Thirdly, it is a fact that debentures are prevalent in Malaysia. Debentures, in law, effectively create a legal charge over movable and immovable properties, invariably a chargee causes to be registered a National Land Code charge over the immovable property forming the subject matter of the charge under the debenture. In the circumstances, I do not see any merit in the first issue raised by counsel for the first defendant. As regards the second issue, this issue has already been

resolved in a number of earlier cases. I need only refer to the case of *Banque Nasionale De Paris v. Wuan Swee May & Anor* [2000] 4 CLJ 387 since that case refers to the earlier cases. This case is authority for the proposition that a foreign entity cannot be said to have carried on banking business within the meaning of Banking and Financial Institutions Act 1989, if the lending to the Malaysian resident was undertaken outside Malaysia. Accordingly, I see no merit in the second issue. The third issue was similarly raised and dealt with in the earlier Federal Court case of *Tan Kok Cheng & Sons Realty Co. Sdn. Bhd v. Lim Ah Pat* [1996] 1 CLJ 231. As the indebtedness of the first defendant was admitted by it in its letters dated 27 May 2009 and 18 August 2009 (See exh. G of encl. 4) to the plaintiff, clearly, there is nothing to arbitrate. It is also trite law that the fact that the proper law of the contract is not Malaysian Law does not preclude the Malaysian Courts from hearing and determining the plaintiff's claim on its merits (see *ELF Petroleum S.E. Asia Pte. Ltd v. Winelf Petroleum Sdn. Bhd* [1984] 1 LNS 166). The first defendant has not led any evidence to suggest that the English Law on the plaintiff's claim is materially different from the Malaysian Law so as to warrant the calling of expert evidence before this court can determine the merits of the plaintiff's claim.

[5] Counsel for the second defendant's only submission is easily disposed of since it is apparent from an examination of the Landlord's Waiver that the validity period of the Waiver has no bearing on the plaintiff. Clause 3 of the Waiver expressly provides that the plaintiff is entitled to exercise its right of entry into the site and remove the equipment 'at any time' after serving notice of default on the first defendant. Since, it is not in dispute that the plaintiff has served such notice of default, in my judgment, the second defendant wrongly refused the plaintiff entry to the site in reliance of the validity clause. Presumably, the second defendant's judgment on the matter was clouded by the purchase agreement it had entered into with the first defendant. As the terms of the Waiver acknowledged the existence of the legal charge created by the first defendant in favour of the plaintiff, in my judgment, the second defendant is clearly estopped, in law, from refusing the plaintiff access upon the incidence of default on the part of the first defendant. Counsel for the first defendant then raised concerns about the need for the plaintiff to repair any damage to the site caused upon the removal of the equipment. Since cl. 3 of the

A Waiver imposed such an obligation on the plaintiff, I do not see this issue as an obstacle to this court granting judgment in favour of the plaintiff.

[6] Accordingly, I order judgment in terms of prayers (1) and (2) B of encl. 1. The plaintiff to ensure that the removal of the equipment forming the subject matter of prayers (1) and (2) of encl. 1 are removed without any damage to the premises of the second defendant and, in the event of the such removal causing any damage, the plaintiff are to repair the premises so as to reinstate C the premises to its original state, at the plaintiff's cost and expense, as per cl. 3 of the Landlord's Waiver dated 13 October 2008.

[7] I order the first defendant to pay fixed costs of RM35,000 *in lieu* of taxation to the plaintiff. I order the second defendant to pay D fixed costs of RM10,000 to the plaintiff. The costs ordered by me against the second defendant is less than the cost ordered against the first defendant because clearly the first defendant has contributed in a considerably bigger way to these proceedings becoming so protracted. To start with, the first defendant should never have E entered into sale agreement with the second defendant, without the consent and participation of the plaintiff. I would not have ordered costs against the second defendant, at all, if the plaintiff had refused to comply with cl. 3 of the Waiver when required to do so by the second defendant. Since the second defendant initially chose to rely F on the sale agreement and deny the plaintiff access in reliance of the validity clause, it must pay cost for the wrongful stand, in law, adopted by it till the very end.

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